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THE MISCHARACTERIZED ASYLUM CRISIS: REALITIES BEHIND PROPOSED REFORMS

Deborah Anker*

The Clinton Administration recently announced proposals for regulatory reform of United States asylum policy.¹ These proposals maintain the basic structure of the current system which includes: (1) an informal Immigration and Naturalization Service (INS) adjudication before an asylum officer for applicants who are not in deportation or exclusion proceedings; and (2) a formal Executive Office of Immigration Review (EOIR) evidentiary hearing before an immigration judge.² A major proposed rule change is that asylum officers will only grant cases and will refer all others to immigration judges for a full evidentiary hearing.³ In addition to these proposed regulatory reforms, there are various legislative proposals including a bill, introduced by Congressman Mazzoli, that would eliminate immigration judges altogether and provide asylum appli-

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1. See Sarah Ignatius, *Restricting The Rights of Asylum Seekers: The New Legislative and Administrative Proposals*, 7 HARV. HUM. RTS. J. 225 (1994) (providing a comprehensive review of these and other asylum reform proposals).

2. INS No. 1651-93: Rules and Procedures for Adjudication of Applications for Asylum and Withholding of Deportation and for Employment Authorization, 59 Fed. Reg. 61, 14,779 (1994) (to be codified at 8 C.F.R. § 208); *INS Drafts Asylum Reform Regulations*, 71 INTERPRETER RELEASES 185 (1994) [hereinafter *INS Asylum Reform Proposals*]. The Justice Department created the Executive Office of Immigration Review (EOIR) in 1983 as a separate agency from the INS. See generally T. ALEXANDER ALEINIKOFF AND DAVID E. MARTIN, IMMIGRATION; PROCESS AND POLICY 638-43 (2d ed. 1994) (providing a detailed description of EOIR procedures); DEBORAH E. ANKER, AMERICAN IMMIGRATION LAW FOUNDATION, LAW OF ASYLUM IN THE UNITED STATES, 22-60 (2d ed. 1991) (same).

3. 59 Fed. Reg. 61, 14,779, 14,786-87 (1994) (to be codified at 8 C.F.R. § 208.14(b)) (proposed March 30, 1994).

cants with a single interview before an asylum officer without a right to an evidentiary hearing or a decision by an independent adjudicator.⁴ There also are several legislative proposals for summary exclusion.⁵ These provide expedited preliminary screening hearings for certain asylum applicants using a legal standard different from the asylum standard, informal interviews by an INS officer, review by another officer but with no evidentiary hearing and severe limitations on most forms of judicial review. Other proposals have suggested the creation of a new type of hearing officer and a change in the standard of proof for asylum.⁶ The strong perception that the existing asylum system is too generous, and that fraudulent claims discredit and overwhelm it, motivates these reforms. Recent media reports fostered this perception and had a significant impact on mobilizing public opinion in favor of reform initiatives.⁷

A study that our immigration and refugee program at Harvard Law School completed a few months ago presents data that challenges these perceptions. The results of this study are contained in a report by Sarah Ignatius.⁸ The two-year report was the first comprehensive non-governmental study of the implementation of the 1990 asylum reforms. Among other changes, the 1990 reforms replaced INS examiners working under the jurisdiction of the local district directors with full-time trained asylum officers who are responsible to the Central INS Asylum Office. The

4. H.R. 3363, 103d Cong., 1st Sess. (1993).

5. S. 1333, 103d Cong., 1st Sess. (1993); H.R. 2836, 103d Cong. 1st Sess. (1993); H.R. 3860, 103d Cong. 2d Sess. (1994). Congressman Mazzoli's bill also contains summary exclusion provisions. *See* H.R. 3363, 103d Cong., 1st Sess. (1993) (pertaining to asylum applicants who arrive without documents or with fraudulent documents). INS officers would screen applicants to determine if they had a "credible fear of persecution" before permitting them to apply for asylum through regular channels. *Id.*; *see also* Ignatius, *supra* note 1, at 236-37 (discussing the uses of the credible fear standard and various reports criticizing the past use of the standard).

6. H.R. 1679, 103d Cong., 1st Sess. (1993).

7. *See, e.g., 60 Minutes: How Did He Get Here?* (CBS television broadcast, Mar. 14, 1993, reprinted in *Asylum and Inspections Reform: Hearings on H.R. 1153, H.R. 1355, and H.R. 1679 Before the Subcomm. on Immigration, Refugees and International Law of the House Comm. on the Judiciary*, 103 Cong., 1st Sess. 51 (1993)).

8. SARAH IGNATIUS, HARVARD LAW SCHOOL, IMMIGRATION AND REFUGEE PROGRAM, NATIONAL ASYLUM STUDY PROJECT, AN ASSESSMENT OF THE ASYLUM PROCESS OF THE IMMIGRATION AND NATURALIZATION SERVICE (1993) [hereinafter NATIONAL ASYLUM STUDY PROJECT FINAL REPORT]. Copies of this report are available by writing to Harvard Law School Immigration and Refugee Program, Pound Hall 511, Cambridge MA. 02138.

Study analyzed 1,331 cases that a total of 151 asylum officers adjudicated in all seven of the asylum regions; these cases included asylum applicants from 60 countries.⁹ The Study contained analyses of 880 notices of intent to deny or preliminary assessments to grant asylum, including 477 received from attorneys and 403 that the INS provided for review.¹⁰ The Study concluded that the asylum officer corps was a significant improvement over the past system of INS adjudication, with substantial management and related problems attributable, in large part, to a failure to fund and otherwise resource the program at an appropriate level.¹¹ Overall, the assessment and recommendations on management and administration were similar to those of a Department of Justice report, released contemporaneously.¹²

I want to discuss some of the Study's findings that relate to the possible existence of an asylum crisis, as promoted and described in the media. First—and this is based on publicly available statistics—asylum applicants arriving in the United States primarily come from refugee-producing countries. The Study compiled statistics after the first eleven months of 1993 and out of approximately 133,000 asylum applicants, seventy percent came from ten countries: Bangladesh, China, El Salvador, Guatemala, Haiti, India, Mexico, Nicaragua, Pakistan, and the Philippines.¹³ In each of these countries except Mexico, human rights organizations documented widespread human rights abuses that produced refugee flows. As the report notes, in Mexico these same human rights organizations have documented targeted persecution.¹⁴

Second, there was a relatively low no-show rate—only sixteen percent—for applicants at INS asylum interviews.¹⁵ As the final report notes, what is quite remarkable is that this appearance rate of eighty-four percent existed despite computer problems that in many cases resulted in “no notice at all of asylum interviews, notice only to the applicant and not his or her attorney, or notice only two or three days before

9. *Id.* at vi.

10. *Id.*

11. NATIONAL ASYLUM STUDY PROJECT FINAL REPORT *supra* note 8, at 3.

12. Management and Planning Staff, Justice Management Division, Management Review of the INS Affirmative Asylum Processing System (Dept. of Justice, Sept. 1993) (on file with *The American University Journal of International Law and Policy*); see 70 INTERPRETER RELEASES, Oct. 18, 1993, at 1364 (providing a report on the two studies).

13. NATIONAL ASYLUM STUDY PROJECT FINAL REPORT, *supra* note 8, at 3.

14. *Id.*

15. See *id.* at 4-5 (referring to the first eleven months of FY 1993).

the interview.”¹⁶ For example, the Newark asylum office, “the office with the highest no-show rate was also the office with the allegations of the most computer errors in the INS database.”¹⁷

Third, much of the present crisis is the result of inefficiency, mismanagement, unfairness, and discrimination attributable to the INS. Thus, of the over 318,000 cases in the backlog at the end of the study period, the previous system left 114,000 cases undecided.¹⁸ Another 50,000 were Salvadoran and Guatemalan claims that the Bush administration, under a settlement agreement in *American Baptist Churches v. Thornburgh*,¹⁹ agreed had to be re-adjudicated because of discrimination against those groups under the pre-1990 INS district director asylum system.²⁰

Fourth, as noted above, the overall assessment of the asylum officer corps was of a “substantially more professional, informed, and impartial body of asylum decision-makers” than the pre-1990 INS examiners.²¹ Asylum officers generally were successful at eliciting the applicant’s claim and at conducting the interviews in a non-adversarial manner.²² The Study identified serious legal errors and substantial unevenness in the quality of decision making.²³ Despite these and other problems, however, the Study found that the asylum officer corps was moving in the direction of improved adjudication. Most of our recommendations related to better management, improved resources, training, and hiring criteria. Although there are several important matters with which we disagree,²⁴ many of our recommendations are consistent with the regu-

16. *Id.*

17. *Id.* at 5.

18. *Id.*

19. 760 F. Supp. 796 (N.D. Cal. 1991); see Carolyn Patty Blum, *The Settlement of American Baptist Churches v. Thornburgh: Landmark Victory for Central American Asylum-Seekers*, 3 INT’L J. REFUGEE L. 347 (1991).

20. NATIONAL ASYLUM STUDY PROJECT FINAL REPORT, *supra* note 8, at 4.

21. *Id.* at 1.

22. See *id.* (stating that “[i]n almost 70% of the asylum interviews studied, asylum officers elicited the claim of the applicant at the interview and conducted the interview in a non-adversarial manner”).

23. *Id.* at 1, 93-94.

24. For example, we disagree with the proposed elimination of Notices of Intent to Deny (NOIDS). We found that rebuttals to NOIDS serve an important corrective role, particularly given the significant incidence of fundamental legal errors in asylum officer decision making. *Id.* at 117. In addition, the Study recommended interviews and adjudication of applications for work authorization within 90 days of filing. The Administration’s proposals do not require the granting of work authorization before

latory reforms proposed by the Clinton administration which maintain the present structure of asylum officer and immigration judge adjudication with additional resources for improved management and quality of decision making. The Study strongly recommended the implementation of these changes rather than "a drastic overhaul of the process or the design of another new administrative structure, which would create additional expense and delay in case adjudication."²⁵

Fifth, many of the problems the Study identified are systemic and are inherent to the nature of the asylum officer corps program. The asylum officer interview is an informal adjudication. Applicants are not afforded basic due process protection guaranteed in immigration court. This includes the right to present and cross-examine witnesses and the right to a court-appointed interpreter.²⁶ There is no meaningful role allowed for the asylum applicant's counsel and no record of the proceedings. Therefore, there is no possibility for accountability in the form of administrative or judicial review.²⁷ We do not believe this type of process can be

180 days after filing. *INS Asylum Reform Proposals*, *supra* note 2. See generally JEANNE BUTTERFIELD, ET. AL, AMERICAN IMMIGRATION LAWYERS ASSOCIATION, COMMENTS, INS NO. 1651-93: RULES AND PROCEDURES FOR ADJUDICATION OF APPLICATIONS FOR ASYLUM OR WITHHOLDING OF DEPORTATION AND FOR EMPLOYMENT AUTHORIZATION (1994) (on file with *The American University Journal of International Law and Policy*) (providing a comprehensive comment on the proposed rules).

25. NATIONAL ASYLUM STUDY PROJECT FINAL REPORT, *supra* note 8, at 2. The present asylum system was never financed or staffed correctly. The asylum office initially asked for a corps of 265 officers and received funding for only 82 positions; a year later the number of officers increased by 68 officers to reach a total of 150. The administration proposes to seek funding for 150 more officers, so that after three years the program will have approximately the number of officers it needed at its inception. *Id.* at 41. With both the backlog and current receipts increasing, this number will be barely adequate when, and if, the positions are funded and allocated. See Roberto Suro, *An Abundance of Asylum Seekers: Overhaul Could Leave 1 Million Immigrants Stuck in Backlog*, WASH. POST, Mar. 14, 1994, at A1. As the National Asylum Study Project report points out "[c]ompared with other countries, the United States has fewer asylum adjudicators and staff proportionately for its case load." NATIONAL ASYLUM STUDY PROJECT FINAL REPORT, *supra* note 8, at 60.

26. See Deborah Anker, *Determining Asylum Claims in the United States: A Case Study on the Implementation of Legal Norms in an Unstructured Adjudicatory Environment*, 19 N.Y.U. REV. L. & SOC. CHANGE 433, 442 (1992) (discussing proceedings before immigration judges).

27. See, *In re —*, (BIA March 7, 1991) (unpublished decision), in DEBORAH ANKER, AMERICAN IMMIGRATION LAW FOUNDATION, 3 LAW OF ASYLUM IN THE UNITED STATES: ADMINISTRATIVE DECISIONS AND ANALYSIS 102 (3d ed. 1994) (noting the difficulty the Board of Immigration Appeals has confronted in reviewing asylum officer decisions is due, in part, to the lack of an adequate record). Compare

the sole means of determining asylum claims. The Study, therefore, recommended maintaining the right to a hearing before an immigration judge allowed under the current system.

We believe that accountability must continue to be built into asylum adjudication. The asylum and immigration administrative systems have suffered, both from the perspectives of fairness and efficiency, from a lack of accountability. For those who care about improving the administration of our immigration laws, it is critical that immigration officials be given less, not more, unreviewable power and discretion. Moreover, the asylum system must not only be expeditious, but also must be perceived as credible. Studies of the current and prior systems reveal decision-making processes that have not always produced consistent and substantively fair outcomes. As noted, the Study found problems in the quality and independence of decision making among the current asylum officer corps.²⁸ A 1987 Government Accounting Office study, that in-

JERRY L. MASHAW, *BUREAUCRATIC JUSTICE* (1983) (arguing that judicial review may not always be the most effective way to insure fairness and efficiency in administrative agencies and that internal accountability through supervisory review and other mechanisms may sometimes be more effective) *with* NATIONAL ASYLUM STUDY PROJECT FINAL REPORT, *supra* note 8, at 116 (noting an insufficient number of supervisors, the lack of appropriate hiring criteria for supervisors, insufficient time spent conducting review of asylum decisions, and the small percentage of cases reviewed by the quality assurance branch of the central office). Our study was not reassuring about internal mechanisms as a substitute for judicial review and other non-agency oversight, such as applicants' attorneys' responses to notices of intent to deny. *Supra* note 24. See generally Stephen H. Legomsky, *Political Asylum and the Theory of Judicial Review*, 73 MINN. L. REV. 1205, 1215 (1989) (discussing the role of judicial review in asylum adjudication).

28. Asylum officers are instructed to reach decisions on individual cases independent from foreign policy considerations. ASYLUM BRANCH & OFFICE OF THE GENERAL COUNSEL, IMMIGRATION AND NATURALIZATION SERVICE BASIC LAW MANUAL: ASYLUM, A TRAINING MANUAL FOR IMMIGRATION AND NATURALIZATION OFFICERS, REFUGEE LAW AND PRACTICE, A REFERENCE OF PERSPECTIVES AND PARAMETERS ON SELECTED LEGAL ISSUES 8 (1991). Further, INS regulations acknowledge the usefulness of non-governmental sources in evaluating conditions in the country of origin. 8 C.F.R. § 208.12(a) (1994). INS developed these guidelines in response to criticism from many quarters that asylum adjudicators were inappropriately influenced by foreign policy and ideological considerations. Anker, *supra* note 26, at n.71-74. Nonetheless, the Study found that asylum officers continued to rely on State Department materials in assessing a well-founded fear of persecution in 80% of the cases studied and used credible non-governmental sources only on a limited basis. NATIONAL ASYLUM STUDY PROJECT FINAL REPORT *supra* note 8, at 8, 123-39. In both these respects, however, asylum officers' decisions demonstrated an improvement over time. *Id.*

cluded cases decided by the INS under the pre-1990 system as well as those decided by immigration judges, found that adjudicators evaluated the claims alleging the most serious forms of persecution differently and that the outcomes varied according to the applicant's nationality.²⁹

Another case study of an immigration court conducted by our program at Harvard found that the court granted only ten percent of the apparently strongest cases³⁰ and that the immigration court system was seriously compromised by a lack of formal procedures, ad-hoc determinations, lack of independence of judgment, over-reliance on the State Department, lack of criteria for establishing precedents at the Board of Immigration Appeals, and other significant inefficiencies.³¹ The immigration court study found that these inefficiencies were largely the responsibility of INS trial attorneys refusing to concede meritorious cases and of immigration judges making inappropriate scheduling decisions, routinely allowing only an hour or two for a hearing which led to continuances for a complete hearing on a claim.³² The EOIR's difficulty in producing transcripts for appeals was the most significant cause of delay in the process. The unavailability of these transcripts resulted in delays averaging twenty-two months after the immigration judge rendered a decision.³³ In addition, the Board of Immigration Appeals required, in most cases, two to three years, and sometimes longer, to issue decisions after attorneys for the applicants submitted briefs.³⁴ Clearly, if we are to continue hearings by immigration judges, that system itself needs substantial improvement such as training for judges and rules that require the Board of Immigration Appeals to make its decision-making processes open and principled.

29. See GOVERNMENT ACCOUNTING OFFICE, *ASYLUM: UNIFORM APPLICATION OF STANDARDS UNCERTAIN—FEW DENIED APPLICANTS DEPORTED* 22, 23 (1987) (stating that "Applicants from different countries who claimed to have suffered similar mistreatment did not have similar approval rates. Worldwide . . . [of] . . . applicants who claimed they were arrested, imprisoned, had their life threatened, or were tortured, we found an approval rate of 19%. Of these aliens, applicants from El Salvador and Nicaragua had a much lower approval rate than applicants from Poland and Iran"). The report also noted agreement between the INS decision and the Department of State advisory opinion in 96% of the cases. *Id.*

30. Anker, *supra* note 26, at 452-454.

31. *Id.* at 455-457, The Board of Immigration Appeals is the administrative appellate body within the EOIR that has jurisdiction over appeals from immigration judge decisions in deportation and exclusion proceedings. *Supra* note 2.

32. *Id.* at 456.

33. *Id.* at 457.

34. *Id.*

It is particularly significant that both the Harvard asylum officer corps and immigration court studies found that many, indeed most, delays are attributable not to the applicant but to the agency, either because of poor, unmonitored judgments or insufficient resources.³⁵ If we embark on a course—one which I fear is implicit in many of the legislative proposals as well as in some aspects of the administration's regulatory proposals³⁶—of giving INS more unreviewable power and discretion, we will exacerbate these management problems as well as create an alarming precedent for arbitrary governmental conduct. The positive changes in the asylum system over the last fifteen years—beginning with the advocacy for the Refugee Act of 1980—are the result of outside voices and scrutiny by the public, the non-governmental and academic communities, as well as by the federal judiciary.³⁷ Many of the best features of the current INS process—indeed, the very endeavor to create a quasi-independent and professional asylum officer corps—are the results of this independent examination and advocacy.³⁸ The establishment of the Resource Information Center,³⁹ the provision in the reg-

35. See *id.* at 456 (noting that less than one percent of the continuances granted were attributable to the applicants failure to appear); see also NATIONAL ASYLUM STUDY PROJECT FINAL REPORT, *supra* note 8, at 4-5, 45-48 (finding a relatively low overall non-appearance rate of 16% and an unusually high non-appearance rate of 33% at the Newark asylum office, where there were the most computer errors in entering applicant names into the database so that they could receive timely notice).

36. See *supra* note 24 (discussing the elimination of notices of intent to deny (NOIDS)).

37. See generally *The Refugee Act of 1980: Its Past and Future*, 1982 MICH. Y.B. INT'L LEGAL STUDIES 91; Deborah E. Anker and Michael H. Posner, *The Forty Year Crisis: A Legislative History of the Refugee Act of 1980*, 19 SAN DIEGO L. REV. 9 (1981) (discussing the history of the Refugee Act of 1980).

38. INS proposed regulations in 1987 that would have created asylum officers not as a separate corps, but as part of the normal INS district director structure. These regulations would have eliminated immigration judges from any role in asylum adjudication. The regulations were defeated by a coalition of advocacy organizations which protested that immigration judge hearings were necessary to ensure protection of basic due process rights. See *Asylum Plan is Under Attack*, N.Y. TIMES October 27, 1987 at A18; Zita Arocha, *Political Asylum Revision Dropped; Immigration Judges to Retain Appeals Role at the INS*, WASH. POST, October 27, 1987 at A23 (discussing the Reagan Administration's proposal to have the Justice Department rule on asylum applications and the Administration's subsequent back-down from the proposal in the face of opposition from attorneys and immigrant advocacy groups). Many of these same groups worked closely with the Justice Department in establishing a consensus for the 1990 reforms, which retained the immigration judges and established a professional and quasi-independent corps of asylum officers.

39. See David A. Martin, *Reforming Asylum Adjudication: On Navigating the*

ulations permitting proof based on the treatment of similarly situated persons,⁴⁰ and the instructions on evaluating credibility in light of information on human rights conditions in the country of origin⁴¹ are attributable to advocacy efforts or judicial review. We have a choice to respond to a mischaracterized crisis and turn back the clock, or to continue the process begun over the last fifteen years of the "transformation" of immigration law, that is, making the practice of immigration agencies consonant with salient norms of administrative law and constitutional due process,⁴² and making agency adjudicatory and decision-

Coast of Bohemia, 138 U. PA. L. REV. 1247, 1342-44 (1990) (recommending the establishment of a documentation resource center independent of the State Department). Professor Martin's article is based on his report to the Administrative Conference of the United States that issued recommendations including the creation of such a center. 54 Fed. Reg. 28,964, 28,970-72 (1989) (codified at 1 C.F.R. § 305.89.4 (1990)). See also Anker, *supra* note 26, at 462 (recommending the establishment of a non-governmental documentation center).

40. 8 C.F.R. §208.13(b)(2)(i) (1994). Before the reforms, numerous courts had suggested that evidence of persecution of those similarly situated constituted proof of the seriousness of the risk to the applicant. See *Bolanos-Hernandez v. INS*, 767 F.2d 1277, 1280 (9th Cir. 1984) (citing evidence of persecution of applicant's friends, who, like he, had refused to join guerrillas, and newspaper articles showing violent consequences for those who refuse to join political guerrilla groups); *Mendoza-Perez v. INS*, 902 F.2d 760, 762 (9th Cir. 1990) (finding proof of danger to applicant where testimony showed others who worked for his organization were killed). In contrast were "years of BIA decisions emphasizing 'singling out' and 'individual targeting'" until the promulgation of the regulation. *Kotas v. INS*, 31 F.3d 847 (9th Cir. 1994), 1994 U.S. App. LEXIS 19671. Actually, the Board of Immigration Appeals had begun to recognize this principle in 1987 after the Supreme Court in *INS v. Cardoza-Fonseca*, 480 U.S. 421, 450 (1987) overruled the agency for imposing an improperly demanding standard of proof on asylum applicants. See *Matter of Mogharrabi*, 19 I&N Dec. 734 (BIA 1988).

41. 8 C.F.R. § 208.13. This regulation is based on principles first articulated by the Ninth Circuit. See *Bolanos-Hernandez v. INS*, 767 F.2d at 1284-1285 (9th Cir. 1984) (overruling the BIA and noting the relevance of the applicant's "general evidence, newspaper articles that demonstrate the political and social turmoil in El Salvador. . ."). See generally Carolyn Patty Blum, *The Ninth Circuit and the Protection of Asylum Seekers Since the Passage of the Refugee Act of 1980*, 23 SAN DIEGO L. REV. 327 (1986) (providing a comprehensive discussion of the role of the Federal Court of Appeals for the Ninth Circuit in reviewing Board asylum decisions); Deborah Anker and Carolyn Blum, *New Trends in Asylum Jurisprudence: The Aftermath of the U.S. Supreme Court Decision in INS v. Cardoza-Fonseca*, 1 INT'L J. REFUGEE L. 252 (1990) (same).

42. See Peter H. Schuck, *The Transformation of Immigration Law*, 84 COLUM. L. REV. 1 (1984) (describing the role of the federal judiciary and other forces in transforming immigration law from its past where it was "radically insulated" from fun-

making processes accessible, principled and accountable.

damental norms of constitutional right, administrative procedure, and judicial role to a new structure more consonant with these principles).